APPENDIX A

SUPREME COURT OF PENNSYLVANIA

Nos. 112 & 113 EAL 2008

IN RE: Condemnation No. 2 By the Commonwealth of Pennsylvania acting by and through the Department of General Services, of Certain Land and Improvements Within an Area Bounded Generally by 13th Street, Broad Street, Arch Street and Race Street For The Purposes of Expansion of the Pennsylvania Convention Center

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PETITION OF: ATE KAYS COMPANY

Petition for Allowance of Appeal from the Order of the Commonwealth Court

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ORDER

PER CURIAM

AND NOW, this 2nd day of July 2008, the Petition for Allowance of Appeal, Emergency Application for Stay and Expedited Consideration, and Application for Expedited Oral Argument are DENIED.

APPENDIX B

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1524 C.D. 2007
No. 1811 C.D. 2007

In Re:

Condemnation No. 2 by the Commonwealth of Pennsylvania acting by and through the Department of General Services, of certain land and improvements within an area bounded generally by 13th Street, Broad Street, Arch Street, and Race Street for the purpose of expansion of the Pennsylvania Convention Center

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Appeal of: Ate Kays Company

ORDER

AND NOW, this 4th day of December, 2007, the orders of the Court of Common Pleas of Philadelphia County, dated July 2, 2007, and September 17, 2007, respectively, are hereby affirmed.

/s/ Rochelle S. Friedman
ROCHELLE S. FRIEDMAN, Judge

Certified from the Record
DEC 4, 2007

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA.

No. 1524 C.D. 2007
No. 1811 C.D. 2007
Argued: October 30, 2007

In Re:

Condemnation No. 2 by the Commonwealth of Pennsylvania acting by and through the Department of General Services, of certain land and improvements within an area bounded generally by 13th Street, Broad Street, Arch Street, and Race Street for the purpose of expansion of the Pennsylvania Convention Center

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Appeal of: Ate Kays Company

BEFORE: Honorable Rochelle S. Friedman, Judge
Honorable Robert Simpson, Judge
Honorable Joseph F. McCloskey, Senior Judge

OPINION BY JUDGE FRIEDMAN

FILED: December 4, 2007

In this consolidated appeal, Ate Kays Company (Condemnee) appeals from the July 2, 2007, and September 17, 2007, orders of the Court of Common Pleas of Philadelphia County (trial court). In the July 2, 2007, order, the trial court overruled Condemnee's Preliminary Objections to the Declaration of Taking filed by the Commonwealth of Pennsylvania, acting by and through the Department of General Services, (Condemnor), condemning property located at 117-

121 N. Broad Street in Philadelphia (Property) as part of the Pennsylvania Convention Center Expansion Project. In the September 17, 2007, order, the trial court granted the Petition for Writ of Possession filed by Condemnor. We affirm both orders.

In 1986, recognizing the public benefits that would result from the construction and operation of a convention center, the Pennsylvania General Assembly enacted The Pennsylvania Convention Center Authority Act (Convention Center Act),[1] now replaced by an amended act at 64 Pa. C.S. §§6001 - 6026. The Convention Center Act created the Pennsylvania Convention Center Authority (PCCA), a body corporate and politic, as an agency and public instrumentality of the Commonwealth and charged the PCCA with exercising the public powers of the Commonwealth for the essential public purpose of, *inter alia,* developing, designing, constructing, improving, maintaining and managing the Convention Center.[2] 64 Pa. C.S. §§6002(10), 6003,

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[1] Act of June 27, 1986, P.L. 267, *formerly* 53 P.S. §§16201 - 16224.

[2] The General Assembly declared that "[t]he health, safety and general welfare of the people of this Commonwealth are directly dependent upon the continual encouragement, development, growth and expansion of business, industry, commerce and tourism within this Commonwealth." 64 Pa. C.S. §6002(1). Further, the General Assembly found that the development and continuation of a convention center would help alleviate unemployment, attract business and tourism and benefit the hotel, restaurant and entertainment industries throughout the region where the convention center is located, 64 Pa. C.S. §§6002(2)-(6). Thus, the General Assembly recognized that the PCCA would exist and operate as a public instrumentality of the Commonwealth acting in furtherance of a public purpose for which public money may be spent, taxes may

6004 and. 6006. As defined in the Convention Center Act, "Construction" includes "extension" and "enlargement" of the Convention Center as well as activities substantially related thereto. 64 Pa. C.S. §6003.

Pursuant to this mandate, the PCCA directed construction of the current Convention Center, which opened in 1993, and following its success, considered the possibility of expanding the facility. Between 1997 and 2004, the PCCA conducted various studies with respect to the design, marketing and economic impact of an expanded Convention Center. Concurrently, the PCCA began meeting with community leaders, preservation groups and government officials, including state legislators, in order to inform them of the need to expand the Convention Center and to seek their support.

As part of its capital budget for public improvement projects, the General Assembly subsequently passed two appropriation bills, one for $400,000,000 in 2004 and a second for $300,000,000 in 2006, for the purpose of expanding the Convention Center (Project), including planning, *land acquisition* and construction. (R.R. at 208a, 254a.) As a result, the Department of General Services (DGS) had the statutory power and duty to implement the legislative appropriation, including acquiring the land necessary for the Project in the name of the Commonwealth. Section 2401.1(4) of the Administrative Code of 1929.[3] DGS, in turn, entered

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be imposed and private property may be acquired by the exercise of eminent domain power. 64 Pa. C.S. §6002(10).

[3] Act of April 9, 1929, P.L. 177, *as amended,* added by section 9 of the Act of July 22, 1975, P.L. 75. This provision sets forth the specific power and duty of the DGS "[t]o acquire land in the

into an Agreement of Agency Designation with the Redevelopment Authority of the City of Philadelphia (RDA), designating the RDA as its agent in acquiring those properties.[4] (Ex. A-K 2, R.R. at 337a-66a.) Pursuant to express powers under the Eminent Domain Code (Code), 26 Pa. C.S. §§101 - 1106, Condemnor issued a Declaration of Taking on September 19, 2006, condemning the Property then owned by Condemnee for use in the Project, as authorized in the capital budget approved by the General Assembly.

On October 25, 2006, Condemnee filed Preliminary Objections (POs), challenging the validity of the Declaration of Taking on eight grounds. Specifically, Condemnee asserted that the condemnation is arbitrary and capricious and an abuse of discretion because: (1) there is no public need for the Project; (2) the condemnation is excessive; (3) Condemnor failed to consider the existence of Project alternatives; (4) Condemnor improperly delegated the

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name of the Commonwealth by purchase or eminent domain proceedings, in fee or in such right, title, interest or easement as the department may deem necessary for the project as specifically authorized in a capital budget. . . ." 71 P.S. §631.1(4). *See also* section 2402(f) of the Administrative Code of 1929, 71 P.S. §632(f).

[4] Section 6.1 of the Redevelopment Cooperation Law, Act of May 24, 1945, P.L. 982, added by section 2 of the Act of January 19, 1968, P.L. (1967) 987, 35 P.S. §1746.1, states in pertinent part that the Commonwealth or any State public body by written agreement may designate a redevelopment authority as its agent within the authority's field of operation to perform any specified activity or to administer any specified program that the Commonwealth is authorized to do in furtherance of the public purposes in the Urban Redevelopment Law (which includes expansion of the Convention Center).

decision as to which properties would be condemned; (5) Condemnor irrationally failed to condemn a similarly situated property; and (6-8) Condemnor failed to properly consider and make an informed judgment regarding the Property's location in a historic district, its architectural significance and its contribution to the streetscape. (R.R. at 3a-10a.)

Condemnor filed its answer on November 14, 2006, and, following the parties' submission of further evidence and briefs, the trial court overruled Condemnee's POs by decision and order dated July 2, 2007.

On July 19, 2007, Condemnor filed a Petition for Writ of Possession pursuant to section 307(a)(1)(iv) of the Code, 26 Pa. C.S. §307(a)(l)(iv), which the trial court granted by decision and order dated September 17, 2007.[5] Condemnee now appeals to this court from those orders.[6]

I. Preliminary Objections

Section 306(a)(3) of the Code provides that preliminary objections shall be limited to and shall be the exclusive method of challenging: (i) the power or right of the condemnor to appropriate the condemned property unless it has been previously adjudicated; (ii) the sufficiency of the security; (iii) the declaration

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[5] *By per curtain* order dated October 11, 2007, this court denied Condemnee's motion for a stay from the trial court's order granting the Petition for Writ of Possession.

[6] Our scope of review in eminent domain cases is limited to determining whether the trial court abused its discretion, whether an error of law was committed or whether the findings and conclusions are supported by sufficient evidence. *In re Condemnation of 30.60 Acres of Land*, 572 A.2d 242 (Pa. Cmwlth. 1990).

of taking; and (iv) any other procedure followed by the condemnor. 26 Pa. C.S. §§306(a)(3). Condemnee first argues that the trial court erred in overruling its POs because the decision to authorize the condemnation of the Property clearly was not valid. We disagree. After extensive review, we conclude that the trial court did not abuse its discretion, that it correctly applied the law and that the record fully supports the trial court's findings and conclusions with regard to Condemnor's eight POs. Accordingly, we adopt the trial court's opinion with respect to the specific issues raised therein.

However, we note that Condemnee's arguments on appeal do not parallel the statements in Condemnee's POs that were considered by the trial court. In its brief to this court, Condemnee essentially abandons most of its POs and limits its argument to a single issue: "whether the decision-maker conducted a 'suitable investigation' and made an 'intelligent, informed judgment' before it made 'the decision to condemn.'" (Condemnee's brief at 31.) Condemnee cites *Winger v. Aires,* 371 Pa. 242, 89 A.2d 521 (1952), and *In re School District of Pittsburgh, Allegheny County,* 430 Pa. 566, 244 A.2d 42 (1968) for the proposition that a condemnation is invalid unless the property is acquired after a suitable investigation leading to an intelligent, informed judgment. Condemnee then asserts that the sole "decision-maker" in this case is the General Assembly, and, relying on *In re Condemnation of 110 Washington Street,* 767 A.2d 1154 (Pa. Cmwlth.), *appeal denied;* 567 Pa. 748, 788 A.2d 379 (2001), Condemnee further argues that the General Assembly's responsibility to

investigate and select properties for condemnation cannot be delegated.[7]

Condemnee contends that the General Assembly's only involvement in the Project was in providing funding and that there is nothing to show that the General Assembly conducted *any* investigation prior to appropriating that capital funding or that it made an informed judgment before authorizing condemnation of specific property for the Project. To the contrary, Condemnee maintains that, to the extent there was any investigation, it was conducted by the PCCA, not the General Assembly, and the results of that investigation were never communicated to the General Assembly. Condemnee further asserts that the PCCA and the RDA determined which properties to condemn, without consulting the General Assembly or providing it with a list of properties chosen for condemnation. According to Condemnee, where, as here, the General Assembly conducted *no* investigation of its own and received *no* information that could lead to an informed decision, its condemnation of the Property necessarily must fail.

However, the record demonstrates that the decision to expand the Convention Center and the determination of the properties that would need to be taken for that Project were made after many years of

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[7] Condemnee contends that, by appropriating funding for the Project, including land acquisition, the *General Assembly* authorized condemnation of all properties needed to implement the Project. Condemnee maintains that the *General Assembly*, therefore, had the obligation to conduct a "suitable investigation" and make an "informed, intelligent judgment" regarding the properties to be condemned and, as confirmed in discovery, the *General Assembly itself* did not do so

studies, planning and discussion. *More important,* Condemnee is ignoring the fact that Condemnor in this case is the Commonwealth, not just members of the General Assembly. The Commonwealth acts through the General Assembly and through the Commonwealth's various agencies, such as the PCCA, and its departments, such as the DGS. Each of these entities is part of the Commonwealth, and each performed its statutory obligation for the Commonwealth with respect to the Project.

The PCCA was created by the Commonwealth "as a public authority and instrumentality of the Commonwealth," which exercises the public powers of the Commonwealth as an agency for the purpose of developing, designing and constructing the Convention Center and for work related to the design, extension and enlargement of the Convention Center. 64 Pa. C.S. §§6003, 6004 and 6006(a). In this capacity and *under the statutory grant of authority, the PCCA undertook studies over a number of years to determine the need to expand the Convention Center and the best way to accomplish this.* Thereafter, the General Assembly, acting in accordance with its powers and responsibilities, passed legislation that appropriated funding for the Project. Ultimately, through its agency agreement with RDA, DGS selected the properties to be acquired for the Project and issued the Declaration of Taking in the name of the Commonwealth. *Pursuant to statute, DGS has the authority and the obligation to acquire by eminent domain all land necessary for projects specifically authorized in a capital budget.* 71 P.S. §631.1(4). That is precisely what it did here, and Condemnee cites no authority for its position that the

Commonwealth did not, and could not, act through these agents.[8]

None of the decisions cited by Condemnee lends support to its argument that, in order for this condemnation to be valid, every step of the proceeding, from investigation through condemnation, would have had to be undertaken by the General Assembly. In *Winger,* for example, the court held that a school board abused its discretion when it voted to acquire by eminent domain almost fifty-five acres of property for a school building that would accommodate only sixty-five pupils. The court characterized the school board's conduct as rebutting the "presumption . . . [that the decisions of school directors] have been reached by the exercise of intelligent judgment and in a legal manner after suitable investigation." *Winger,* 371 Pa. at 246, 89 A.2d at 523 (citation omitted). The issue presented in *School District of Pittsburgh* was whether a school board's condemnation of land for off-street parking facilities was for a proper school purpose, as required by applicable law. After answering in the affirmative, the court in *School District of Pittsburgh* cited *Winger* and observed that unless property is acquired for an authorized public use, and after a suitable investigation leading to an intelligent informed judgment by the condemnor, the condemnation is invalid. However, in making this observation, the court was addressing the issue of whether the school district could acquire land for the purpose of future,

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[8] Moreover, were we to agree with Condemnee's argument that the General Assembly itself must conduct all investigations and make each decision required for the numerous public projects it funds, the operation of state government would grind to a halt.

as yet unplanned expansion. Thus, *Winger* and *School District of Pittsburgh* have no relevance to the issue of whether the Commonwealth can effectuate a condemnation through its statutorily designated agents. Similarly, we note that the decision in *Condemnation of 110 Washington Street,* wherein the court held that the power of eminent domain cannot be delegated to a *private entity,* has no bearing on this matter.

The burden of proving that the condemnor has abused its discretion is on the objector or condemnee, and that burden is a heavy one because, in such cases, there is a strong presumption that the condemnor has acted properly. *Appeal of Waite,* 641 A.2d 25 (Pa. Cmwlth.), *appeal denied,* 539 Pa. 657, 651 A.2d 543 (1994). In this case, we agree with the trial court that Condemnee has not offered sufficient evidence to carry its burden of proof.

II. Writ of Possession

Condemnee also argues that the trial court erred in granting Condemnor's Petition for Writ of Possession while Condemnee's POs were pending on appeal. Condemnee characterizes Condemnor's Petition for Writ of Possession as a request for extraordinary relief and argues that the trial court erred and abused its discretion in granting possession of the Property to Condemnor before Condemnee's POs have been finally disposed of. We disagree.

The trial court granted Condemnor's Petition for Writ of Possession pursuant to section 307(a) of the Code, which provides, in relevant part:

(a) Possession or right of entry of condemnor.—

(1) (iv) The court, unless preliminary objections *warranting delay are pending,* may issue a writ of possession conditioned except as provided in this subsection upon payment to the condemnee or into court of the estimated just compensation and on any other terms as the court may direct.

(2) *A court may issue a writ of possession to a condemnor prior to the disposition of preliminary objections.*

(ii) If it is finally determined that any other condemnation is invalid after the granting of possession under this paragraph, the affected owners may recover costs and expenses under section 306(g) (relating to preliminary objections) and are entitled to disposition under section 306(f).

26 Pa. C.S. §307(a) (emphasis added). Relying on *West Whiteland Associates v. Department of Transportation,* 690 A.2d 1266 (Pa. Cmwlth.), *appeal denied,* 550 Pa. 714, 705 A.2d 1313 (1997), as a case that "addressed the types of preliminary objections that 'warrant delay,'" Condemnee argues that, because its POs "go to the very heart of the protections afforded by the United States and Pennsylvania Constitutions," (Condemnee's brief at 62), they are precisely the type of substantive POs that warrant delay. However, the issue in *West Whiteland* was whether a condemnee waived its right to contest the description of its condemned property when *it filed no preliminary objections* to the declaration of taking. Because this is not the issue before us, *West Whiteland* offers no guidance in this matter.

Condemnee also cites *Appeal of Conway*, 432 A.2d 276 (Pa. Cmwlth. 1981), and *Condemnation Proceeding In Rem By The Redevelopment Authority of the City of Philadelphia*, 686 A.2d 453 (Pa. Cmwlth. 1996), as holding that a writ of possession may not be issued in instances where a condemnee will not have an adequate remedy if it successfully challenges the condemnation. Condemnee points out that the Property contains a building of significant historic and architectural significance, which Condemnor plans to demolish after gaining possession of the Property. Condemnee reasons that, if it ultimately prevails, any post-demolition remedy will be insufficient as this building will be lost forever.[9]

Although Condemnee is correct that, once demolished, the building cannot be restored, we are not persuaded that the trial court abused its discretion by granting possession to Condemnor. Both *Appeal of Conway* and *Condemnation Proceeding* are distinguishable from the present matter. In each of those cases, the condemnee filed preliminary objections to a declaration of taking and raised issues that warranted an evidentiary hearing. However, in each case, the lower court denied the preliminary objections *without* establishing a record

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[9] In its Petition for Writ of Possession, Condemnor claims that it has an immediate need for the Property if it hopes to keep on schedule with the Project and avoid delay costs that could rise to an estimated $2,400,000 per month. (R.R. at 467a-68a.) In response, Condemnee argues that it has a constitutional right to challenge the condemnation and should not be penalized for exercising that right. Moreover, Condemnee asserts that Condemnor is "crying wolf" with respect to increased construction costs, and, in any event, any purported hardship is entirely self-imposed.

and *without* properly considering the substantive issues raised. As a result, *this court concluded that the lower court's dismissal of the preliminary objections was erroneous,* and we remanded so that the lower court could deal with those objections. In addition, we vacated the lower court's issuance of a writ of possession, explaining that, because the Code fails to provide redress for loss of possession in the event the condemnee successfully resists condemnation, the issuance of a writ of possession to a condemnor prior to the *proper* disposition of preliminary objections that challenge the validity of the condemnation would be constitutionally infirm. *Id.* In stark contrast to those cases, the trial court here fully disposed of all of Condemnee's POs based on an extensive evidentiary record, and we now affirm that determination.

Where, as here, the trial court properly determined that Condemnee failed to meet its heavy burden of showing that the condemnation of its Property was arbitrary, capricious or an abuse of discretion, we conclude that the trial court did not abuse its discretion in granting possession of the Property to Condemnor.

Accordingly, we affirm the trial court's order overruling Condemnee's Preliminary Objections, and we also affirm the trial court's order granting Condemnor's Petition for Writ of Possession.

/s/: Rochelle S. Friedman
ROCHELLE S. FRIEDMAN, Judge

APPENDIX C

IN THE COURT of COMMON
PLEAS - PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT of PENNSYLVANIA
CIVIL TRIAL DIVISION

SEPTEMBER TERM 2006

NO. 1887

EMINENT DOMAIN

IN REM

Control Number 110840

In Re Condemnation No. 2 By the Commonwealth of Pennsylvania, acting by and through the Department of General Services, of Certain Land and Improvements Within an Area Bounded Generally by 13th Street, Broad Street, Arch Street, and Race Street For The Purpose of Expansion of the Pennsylvania Convention Center

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AND NOW, this 2nd day of July, 2007, upon consideration of the Preliminary Objections of Ate Kays Company ("Preliminary Objections") to the Declaration of Taking of the Commonwealth of Pennsylvania, acting by and through the Department of General Services (the "Commonwealth"), the Answer thereto by the Commonwealth, the deposition testimony, exhibits and supplemental submissions by the parties:

IT IS HEREBY ORDERED that the Preliminary Objections are overruled.

BY THE COURT:

/s/ J. Glazer
GLAZER, J.

COPIES SENT
PURSUANT TO Pa.R.C.P. 236(b)
JUL 06, 2007
FIRST JUDICIAL DISTRICT OF PA

IN THE COURT of COMMON
PLEAS - PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT of PENNSYLVANIA
CIVIL TRIAL DIVISION

SEPTEMBER TERM 2006

No. 1887

EMINENT DOMAIN

IN REM

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In Re: Condemnation No. 2 By the Commonwealth of Pennsylvania, acting by and through the Department of General Services, of Certain Land and Improvements Within an Area Bounded Generally by 13th Street, Broad Street, Arch Street and Race Street For The Purpose of Expansion of the Pennsylvania Convention Center

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OPINION IN SUPPORT OF ORDER OVERRULING PRELIMINARY OBJECTIONS TO DECLARATION OF TAKING OF CONDEMNOR

GLAZER, J. July 2, 2007

FACTUAL INTRODUCTION

In 1986, The Pennsylvania General Assembly passed The Pennsylvania Convention Center Authority Act, 53 P.S. §§ 16201, *et seq.* (now replaced by an amended Act at 64 Pa.C.S.A. §§ 6001, *et seq.),* creating the Pennsylvania Convention Center

Authority ("PCCA"). The PCCA is a body public and corporate as an agency and public instrumentality of the Commonwealth. 53 P.S. § 16203 and § 16204 (now, 64 § 6003 and § 6004).

The General Assembly subsequently passed two appropriation bills, one for $400,000,000 in 2004 and a second for $300,000,000 in 2006 for the purposes of expansion of the Pennsylvania Convention Center. As part of the Pennsylvania Convention Center Expansion Project, the PCCA condemned property located at 117-121 N. Broad Street, Philadelphia, Pennsylvania. The PCCA condemned the properties pursuant to its express powers under the Eminent Domain Code, 26 Pa. C.S.A. §§ 101, *et seq.*

PROCEDURAL BACKGROUND

On September 19, 2006, the Commonwealth of Pennsylvania filed a Declaration of Taking pursuant to the Eminent Domain Code, *cited infra,* that condemned 117-121 N. Broad Street, Philadelphia, PA, then owned by Ate Kays. On October 25, 2006, Ate Kays filed Preliminary Objections to the Commonwealth's Declaration of Taking. On November 14, 2006, the Commonwealth filed its Answer to Ate Kays' Preliminary Objections. The parties subsequently submitted further evidence and briefs to the court on June 15, 2007. As further explained below, this court overrules the Preliminary Objections.

LEGAL ANALYSIS

It is well settled that preliminary objections filed pursuant to the Eminent Domain Code are the exclusive means of challenging a condemnation. *Mahan v. Lower Merion Township*, 212 A.2d 217 (Pa.

1965); *Appeal of McKonly*, 618 A.2d 1169 (Pa. Commw. Ct. 1992). Condemnee Ate Kays has filed the following Preliminary Objections, and an accompanying legal analysis in support of the court's decision follows each objection.

1) The Condemnation is Arbitrary and Capricious and an Abuse of Discretion Because There is no Public Need for the Project that is the Stated Purpose of the Condemnation

This Preliminary Objection is overruled as a matter of law. The Eminent Domain Code limits the scope of preliminary objections to those specifically enumerated in Section 306, 26 Pa.C.S.A. § 306. Ate Kays' objection that there is no "public need" is not allowable within the scope of the objections.

Even if Kays' objection based upon no "public need" were allowable, this court hereby finds that the Commonwealth of Pennsylvania demonstrated a sufficient public need for the project. In the Pennsylvania Convention Center Authority Act, *cited infra,* the General Assembly stated that "the health, safety, and general welfare of the people of the Commonwealth are directly dependant upon the continual . . . growth and expansion of business . . . and tourism" and that it is the public policy of this Commonwealth to promote, attract, develop and expand business and tourism by the development and continuation of a convention center. 64 Pa. C.S.A. § 6002.

Additionally, the Commonwealth introduced depositions and documents detailing the social and economic benefits of an expanded Convention Center, such as job growth, tax revenue, tourism, and the

continued cultural vitality of the region and the Commonwealth.

This court further finds that the condemnation was neither arbitrary nor capricious nor an abuse of discretion. The decision to expand was based upon a nine year process involving studies conducted by consultants, architects, and engineers, as well as meetings with legislative bodies, committees, and community, civic, and business organizations. (From Commonwealth's Supplemental Submission to Preliminary Objections, hereinafter referred to as "Commonwealth Brief", page 20).

2) The Condemnation is Arbitrary and Capricious and an Abuse of Discretion Because the Condemnation is Excessive as it Relates to the Stated Purpose of the Condemnation

This Preliminary Objection is also overruled as a matter of law. As stated in the analysis above overruling the first objection, the Eminent Domain Code *(cited infra)* limits the scope of preliminary objections to those specifically enumerated in the statute. However, this court finds that the taking was not arbitrary or capricious on the facts, and the condemnation was not excessive in relation to the purpose of the condemnation, as alleged by Ate Kays.

As noted *in In re: Commonwealth, Department of Transportation,* 558 A.2d 605, 608 (Pa. Commw. 1989), the amount or location of the land to be taken is not subject to judicial review unless the decision is arbitrary, capricious or fraudulent. A condemnee carries a heavy burden in order to prove fraud or an abuse of discretion by a government entity in an eminent domain action. *In re: Condemnation of*

School District of Pittsburgh, 244 A.2d 42, 46 (Pa. 1968).

There is no evidence whatsoever that the condemnation was arbitrary or capricious. The PCCA commissioned architects to study the necessity, feasibility, and desirability of expanding the Convention Center. (Harry Perks deposition, pp. 11-12). The studies concluded that a Convention Center which expanded westward to Broad Street would allow several thousand more square feet of ballroom space, exhibit space, and meeting rooms. *(id* at 12-13 and Andrew McLean deposition, pp. 25-26). This additional square footage will greatly increase Philadelphia's market share in competing for trade shows and meetings of professional associations. (McLean, pp. 22-24, 33-34, 39, 43, 46-47, 56, 58). It will also allow the Convention Center to have an entrance on Broad Street, a major thoroughfare in the City of Philadelphia with access to hotels, public transit, and the commercial and cultural hub of Center City Philadelphia. (McLean, pp. 25-26).

Ate Kays also contends that the taking of his property was arbitrary and capricious because the Convention Center could be expanded sufficiently to meet their needs without taking his property. This objection is totally without merit.

A landowner may not object to the necessity of taking his property because another property may be more amenable to a taking. *Blank v. Columbia Gas of Pennsylvania, Inc.,* 314 A.2d 880, 883 (Pa. Commw. 1974), citing *Duquesne Light Co. v. Upper St. Clair Twp.,* 105 A.2d 287, 294 (Pa. 1954). Kays' objection is therefore overruled as a matter of law.

Even if Ate Kays' objection were allowed, however, the Commonwealth sufficiently demonstrated that their decision to not integrate Kays' property into the project was neither arbitrary nor capricious. The Commonwealth studied the feasibility of incorporating Ate Kays' building into the expanded Convention Center or expanding the Center while allowing his building to remain intact. The architectural design team ultimately concluded that integrating the building into the expanded center or building the center around the Kays property would entail great expense and serious delay, and may jeopardize many of the stated goals of the expansion project. (McLean, pp. 55-57).

This court finds that the condemnation was neither arbitrary nor capricious, but was rather the result of several years of dedicated study by expert architects, market analysts, government officials and community groups. The Preliminary Objection is thereby overruled.

3) The Condemnation is Arbitrary and Capricious and an Abuse of Discretion Because Condemnor Failed to Give Proper Consideration to, and Failed to Make an Informed Judgment With Respect to, Condemnation of the Property in Light of the Existence of Project Alternatives that Did Not Require the Condemnation of the Property in Its Entirety

This Preliminary Objection is overruled. The PCCA extensively studied the possibly of integrating Ate Kays' building, or part of his building, into the expanded Convention Center in order to prevent the complete demolition of the building. (McLean, pp. 53-54, Perks, p. 54). The architectural design team concluded that integrating the building into the

Center would be extremely difficult because of the location of the building and the vast disparity in floor-to-ceiling heights between Kays' building and the Center. (McLean, pp. 53-54). Adapting Kays' building also presented legal and procedural barriers to project expansion, such as property line disputes, code issues, and licensing. (Perks, p. 50 & 54, McLean, p. 55).

The decision to condemn Ate Kays' property in its entirety was not arbitrary or capricious. The decision was the result of several years of studies and expert reports. (McLean, pp. 53-54, Perks, p. 54).

4. The Actions of the Condemnor in Proceeding with this Condemnation are Arbitrary and Capricious and an Abuse of Discretion Because Condemnor Improperly Delegated the Decision as to Which Properties Would be Condemned

The General Assembly expressly authorized the condemnation of all the properties for the Expansion Project (Ate Kays Deposition Exhibit 3; House Bill No. 1634, Session of 2003) and the Department of General Services, acting pursuant to its enabling statute, selected the properties that were necessary for the expansion of the project. (Ate Kays Deposition Exhibit 2; Agreement of Agency Designation Pursuant to the Redevelopment Cooperation Law).

The PCCA was created by the General Assembly's Pennsylvania Convention Center Authority Act *(cited infra)*. The PCCA is expressly mandated to "exercise the public powers of the Commonwealth as an agency for the purpose...of developing, designing, constructing, improving, maintaining [and] managing a convention center." 64 Pa.C.S.A. § 6006 (a).

To implement the expansion, The Department of General Services entered into an Agreement of Agency pursuant to the Redevelopment Cooperation Law with the Redevelopment Authority of the City of Philadelphia (RDA). (Ate Kays Deposition Exhibit 2, Agreement of Agency Designation Pursuant to the Redevelopment Cooperation Law). The RDA then filed the declaration of takings, in the name of the Commonwealth of Pennsylvania. (Joseph Resta deposition, p. 23).

This court thereby finds that the Commonwealth of Pennsylvania, through the Department of General Services, the PCCA and the RDA, selected the properties to be condemned. There was no delegation of this power. The Preliminary Objection is therefore overruled.

5) The Condemnation is Arbitrary and Capricious and an Abuse of Discretion Because Condemnor Irrationally Failed to Condemn a Similarly Situated Property

This objection is improper as a matter of law and inaccurate based upon the facts. Choosing one property to condemn rather than a separate property is not a legally sufficient objection according to the Eminent Domain Code, *cited infra.*

Furthermore, the Department of General Services is authorized to acquire land that *it* deems necessary for a project. 71. P.S. § 631.1 (4) and courts will generally not second guess a condemnor's choice to condemn a particular site. *See Downingtown Area School v. DiFrancesco*, 557 A.2d 819, 821 (Pa.Commw. 1989) and *Appeal of Waite*, 641 A.2d 25 (Pa. Commw. 1994).

On the facts presented here, however, if the objection were proper, the Commonwealth has demonstrated that there are legitimate financial and logistical reasons why Ate Kays' building has been condemned and the Liberty Title and Trust Building has not. Upon extensive study and analysis, the Department of General Services decided not to acquire the Liberty Title and Trust Building. The decision was largely financial; it would be too expensive to condemn and demolish the Liberty Building. (Resta deposition, p. 66). The Preliminary Objection is overruled,

6) and 7) The Condemnation is Arbitrary, and Capricious and an Abuse of Discretion Because Condemnor Failed to Give Proper Consideration to, and Failed to Make an informed Judgment with Respect to, Condemnation of the Property in Light of its Location in a Historical District and its Contribution to that District and in Light of its Architectural Significance

As previously noted, the Eminent Domain Code *(cited infra)* limits the scope of preliminary objections. Objections concerning the "historic or architectural significance" of the condemnee's property are not among the objections allowed by the Code. A property owner is not granted immunity from condemnation solely on the virtue of a property's location in a historic district. *See Domino v. Department of Transportation,* 453 A.2d 719 (Pa. Commw. 1982).

Even if the aforementioned objections were allowed, however, the Commonwealth has sufficiently demonstrated that it strongly considered and evaluated the condemnation in light of its historical and architectural significance. Architects

met extensively with historic preservation groups from the community and the State Historic Preservation Office. (Hyman Myers deposition, p. 21). A "Memorandum of Agreement" dated October 2004 stated that the PCCA had met in open and public sessions with historical preservation representatives from the entire Philadelphia Area community. (Ate Kays Exhibit 9). This Memorandum expressly acknowledged the adverse effects of demolition, and specifically required that the PCCA preserve specified buildings within the historical district, as well as photographs, artifacts and other items of historical significance. (Ate Kays Exhibit 9, Section V).

Legally, the PCCA did not require approval from a historical preservation office or a community association before condemning Kays' property. On the facts, however, the court finds that the PCCA worked extensively with members of the historical preservation community to reach an agreement whereby the expansion of the Center could move forwards while retaining the architectural history of the district. The Preliminary Objections are overruled.

8) The Condemnation is Arbitrary and Capricious and an Abuse of Discretion Because the Condemnor has Failed to give Proper Consideration to, and Failed to Make an Informed Judgment with Respect to, Condemnation of the Property in Light of its Contribution to the Streetscape

The Eminent Doman Code (cited *infra)* does not allow for this objection. Additionally, as noted previously, courts are discouraged from substituting their judgment for that of the condemnor on which

land should be taken. *See Simco Stores v. Redevelopment Authority,* 317 A.2d 610 (Pa. 1974).

Even if the objection were allowed, however, the court finds that Ate Kays has not brought forth sufficient evidence that an expanded Center will negatively affect the streetscape. Ate Kays' own expert admitted that he could not opine on the effect of a Center expansion on pedestrian traffic north of City Hall along Broad Street. (John K. Partrodge deposition, p. 33). Furthermore, the Commonwealth has brought forward an expert who testified at length about the positive contribution to the pedestrian streetscape that a Broad Street Entrance to the Center would bring. (McLean deposition, p. 26).

As a matter of law, the objection concerning the impact on the streetscape is improper. Additionally, after examination of the factual record, Ate Kays has failed to establish that the Commonwealth's actions were arbitrary, capricious or an abuse of discretion. The Preliminary Objection is overruled.

CONCLUSION

Many of Ate Kays' objections are overruled as a matter of law because of the specific limits to the scope of preliminary objections enumerated in the Eminent Domain Code *(cited infra).* All of his objections are overruled based upon an extensive factual record of depositions, legislative history, and other documentation that legally support the Commonwealth of Pennsylvania's Declaration of Taking. The condemnation of 117-121 N. Broad Street, Philadelphia, PA may hereby proceed over the Preliminary Objections.

BY THE COURT:

/s/ J. Glazer
Glazer, J.

APPENDIX D

COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

SPETEMBER TERM, 2006
No. 001887

MINENT DOMAIN

IN REM

IN RE:

Condemnation No. 2 By The Commonwealth of Pennsylvania, acting by and through the Department of General Services, of Certain Land and Improvements Within an Area Bounded Generally by 13th Street, Broad Street, Arch Street and Race Street For the Purpose of Expansion of The Pennsylvania Convention Center

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ORDER

AND NOW, this 17th day of September 2007, upon consideration of Condemnor's Petition for Writ of Possession and the Condemnee's response thereto, it is hereby ORDERED that the petition is GRANTED.

BY THE COURT

/s/ Gary F. Di Vito
Gary F. Di Vito, *J.*

Docketed SEP 18, 2007
J. KELLEHER

Copies Sent Pursuant to Pa.R.C.P. 236(b)
SEP 18, 2007
First Judicial District of PA

APPENDIX E

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1811 C.D. 2007

In Re:

Condemnation No. 2 by the Commonwealth of Pennsylvania acting by and through the Department of General Services, of Certain Land and Improvements Within an Area Bounded Generally by 13th Street, Broad Street, Arch Street, and Race Street For the Purpose of Expansion of the Pennsylvania Convention Center

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Appeal of: Ate Kays Company

ORDER

AND NOW, this 10th day of October, 2007, it is hereby Ordered that:

1. Appellant Ate Kays Company's request for an Application for Stay from the Court of Common Pleas of Philadelphia County's grant of a writ of possession of property located on Broad Street in Philadelphia is denied.

2. Oral arguments on Appellant Ate Kays Company's appeal from the order of the Court of Common Pleas of Philadelphia County dismissing its preliminary objection will be heard on the October-November 2007 argument list in Philadelphia.

3. Appellant Ate Kays Company's brief is due on October 17, 2007.

4. Respondent City of Philadelphia Redevelopment Authority's brief is due on October 25, 2007.

/s/ Dan Pellegrini
DAN PELLEGRINI, Judge

Certified from the Record
October 10, 2007

APPENDIX F

THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 175 EM 2007

IN RE: CONDEMNATION NO. 2 BY THE COMMONWEALTH OF PENNSYLVANIA, ACTING BY AND THROUGH THE DEPARTMENT OF GENERAL SERVICES, OF CERTAIN LAND AND IMPROVEMENTS WITHIN AN AREA BOUNDED GENERALLY BY 13TH STREET, BROAD STREET, ARCH STREET, AND RACE STREET FOR THE PURPOSE OF EXPANSION OF THE PENNSYLVANIA CONVENTION CENTER

PETITION OF: ATE KAYS COMPANY

Emergency Application for Stay Pending Appeal

Application for Expedited Oral Argument

Application for Leave to File a Reply Memorandum

ORDER

PER CURIAM

AND NOW, this 9th day of November 2007, the Emergency Application for Stay Pending Appeal, the Application for Expedited Oral Argument, and the Application for Leave to File a Reply Memorandum are DENIED.

Attest: Nov. 9, 2007

/s/ Patricia Johnson, Chief Clerk
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania, Eastern District

APPENDIX G

COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

September Term 2006
NO. 001887

EMINENT DOMAIN

IN REM

In Re:

Condemnation No. 2 By The Commonwealth of Pennsylvania, acting by and through the Department of General Services, of Certain Land and Improvements Within an Area Bounded Generally by 13th Street, Broad Street, Arch Street and Race Street For the Purpose of Expansion of the Pennsylvania Convention Center

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ORDER

AND NOW, this 25th day of September 2007, upon consideration of Condemnee's Motion for Stay of Order Granting Condemnor the Commonwealth of Pennsylvania's Petition for Writ of Possession Pending Appeal and the Condemnor's response thereto, it is hereby ORDERED that: the MOTION IS DENIED.

The Commonwealth/RDA is directed to pay the Estimated Just Compensation into court within five (5) days from the date hereof.

BY THE COURT:

/s/ Gary F. Di Vito, J
Di Vito, J.